UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

WILLIAM H. HARRELL, JR., et al., Plaintiffs, v. THE FLORIDA BAR, et al., Defendants.	)	Civil Action No. 3:08-cv-00015-VMC-TEM

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT OF MOTION

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PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs hereby move for a preliminary injunction against enforcement of the following provisions of the Florida Rules of Professional Conduct against plaintiff William H. Harrell, Jr. and Harrell & Harrell, P.A., for their use of the advertising campaign attached as Exhibit 1 to the declaration of William H. Harrell, Jr.

1. Rule 4-7.1, to the extent it requires advertisements to provide only "useful, factual information presented in a nonsensational manner;"

2. Rule 4-7.2(c)(1), to the extent it classifies a truthful statement as "misleading" because the statement would also be true for many other lawyers;

3. Rule 4-7.2(c)(1)(D), to the extent the rule prohibits statements that are "unsubstantiated in fact" but that are inherently subjective or statements of opinion, and that are therefore not false or misleading;

4. Rule 4-7.2(c)(1)(G), which prohibits statements that "promise results," to the extent the rule prohibits statements that are inherently subjective or statements of opinion, and that are therefore not false or misleading;

5. Rule 4-7.2(c)(1)(I), which prohibits any communication that "compares the lawyer's services with other lawyers' services," to the extent the rule prohibits statements that are inherently subjective or statements of opinion, and that are therefore not false or misleading;

6. Rule 4-7.2(c)(2), which prohibits statements "describing or characterizing the quality of the lawyer's services," to the extent the rule prohibits statements that are inherently subjective or statements of opinion, and that are therefore not false or misleading;

7. Rule 4-7.2(c)(3), which prohibits "visual and verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events" that are "manipulative, or likely to confuse the viewer," to the extent the rule prohibits statements that are not false or misleading; and 4-7.5(b)(1)(A), to the extent it also prohibits such statements;

8. Rule 4-7.5(b)(1)(C), which prohibits the use of "any background sound other than instrumental music;"

9. Rule 4-7.7(a)(1), which imposes a prior restraint on attorney advertising.

As set forth in the accompanying memorandum, these rules unconstitutionally restrict lawyer advertising in violation of the First Amendment to the U.S. Constitution.

MEMORANDUM IN SUPPORT OF MOTION

In November, 2007, the Florida Bar informed Jacksonville attorney William H. Harrell, Jr. that he was prohibited, on pain of professional discipline, from running a television advertising campaign that included the phrase "Don't settle for less than you deserve." Harrell Decl. ¶ 14.[1] According to the Bar, the statement improperly "characterize[d] the quality of legal services being offered" in violation of Rule 4-7.2(c)(2) of the Florida Rules of Professional Conduct. *Id.* In coming to this conclusion, the Bar reversed its own prior determination, made in 2002, that the phrase was allowed by the rules. *Id.* ¶ 6. The Bar's abrupt change in position threatens to undo years of investment into developing a brand that has become widely recognized within Harrell's market, and was made without explanation, without evidence that consumers were deceived or otherwise harmed by the phrase, and in violation of the First Amendment.

The Bar's arbitrary action with respect to Harrell is typical of its rigorous but inconsistent enforcement of its content-based advertising restrictions. Acting seemingly at random, the Bar prohibits common and innocuous advertising techniques in an effort to promote its own conceptions of dignity and professionalism. These restrictions prohibit stock advertising devices that are widespread in other industries but that the Bar characterizes as either factually unverifiable or irrelevant to the decision whether to retain a lawyer and, therefore, unfit for consumption by Florida consumers. Moreover, the Bar enforces its restrictions through a system of prior restraint, requiring lawyers to submit advertisements for pre-screening in a process that leaves nearly standardless discretion in the hands of Bar administrators and provides no opportunity for judicial review. Plaintiffs seek a preliminary injunction against enforcement of these rules against Harrell's ad campaign on the ground that they violate the First Amendment.

[1] A video of the advertisements is attached as Exhibit 1 to the declaration of William H. Harrell, Jr.

BACKGROUND

I. The Florida Bar's Restrictions on Lawyer Advertising

Members of the Florida Bar are required to comply with restrictions on the content of attorney advertising set forth in the Florida Rules of Professional Conduct. Rules Regulating the Florida Bar § 3-4.2. Violations of the rules are grounds for discipline, including public reprimand, suspension, and disbarment. *Id.* §§ 3-4.2, 3-5.1. In addition to the content-based restrictions, the Bar requires lawyers to obtain pre-approval of television and radio ads before broadcasting them. Florida Rule of Professional Conduct 4-7.7(a)(1). The Florida Bar, and defendant Bar officials, are responsible for screening advertisements submitted for approval, investigating complaints of rules violations, and prosecuting alleged violators.

Although some of the advertising rules prohibit false and misleading advertising and thus vindicate the Bar's interest in protecting consumers from fraud, the rules also classify as "misleading" harmless advertising techniques that are prevalent in the media and that consumers are accustomed to seeing. First, Rule 4-7.1 requires lawyer advertisements in Florida to "provide only useful, factual information presented in a nonsensational manner." Rule 4-7.1, cmt.; *see also Fla. Bar v. Pape*, 918 So. 2d 240, 243 (Fla. 2005) (holding that this section limits lawyer advertisements to "objective information"). The general rule set forth in Rule 4-7.1 is backed up by Rule 4-7.2's prohibition of ads that are "misleading," which the Florida Supreme Court has interpreted to include anything that cannot be objectively verified. *Pape*, 918 So. 2d at 244 (holding that a logo was "inherently deceptive" because there was "no way to measure" whether it "convey[ed] accurate information"). Moreover, a comment to the rules states that a lawyer advertisement is "misleading" when it states that a lawyer possesses a qualification that is common to most or all other lawyers in Florida, such as the statement that a lawyer is a member

of the Florida Bar. Rule 4-7.2, cmt.

The Bar's methodology for determining whether an advertisement is "misleading" appears to take the most literal and unintelligent possible reading of an advertisement and project that understanding onto consumers. The Bar's Handbook on Lawyer Advertising and Solicitation, which is designed to give lawyers guidance on interpreting the rules, includes, as an example of a "misleading" advertisement, the statement: "Injured? Then you need an attorney." Harrell Decl., Exh. 2 at 58. According to the handbook, this statement is misleading "because an attorney is not always required," a fact that would be obvious to any reasonable consumer. *Id.* Similarly, the handbook states that the phrase "EXPERIENCE MAKES THE DIFFERENCE!" is prohibited "[b]ecause experience of the attorneys may not affect the outcome of a particular case." *Id.* at 60. The Bar may be correct about that in the most literal sense, but no consumer is likely to believe otherwise.

Several specific rules embody the prohibition on advertisements that the Bar classifies as "misleading" because they contain inherently subjective statements or statements of opinion. First, the rules prohibit advertisements that "describ[e] or characteriz[e] the quality of the lawyer's services," Rule 4-7.2(c)(2), a provision that the Florida Supreme Court has interpreted to prohibit statements about a lawyer's "character and personality traits," *Pape*, 918 So. 2d at 244. According to the Bar, the statement "Don't settle for less than you deserve" violates this rule, as do such innocuous statements as "you need someone who you can turn to, for trust and compassion with this delicate matter," "Ticket Wizards," and "MAKE THE RIGHT CHOICE!" Harrell Decl. ¶ 14, Exh. 5 at 3, Exh. 6 at 3, Exh. 11 at 4. Second, the rules prohibit advertisements that are "unsubstantiated in fact," Rule 4-7.2(c)(1)(D), including statements that "compare[] the lawyer's services with other lawyers' services," Rule 4-7.2(c)(1)(I). To the extent

these provisions prohibit statements that are factually false, they are unobjectionable. However, a comment to the rules explains that the rules also bar statements that could *never* be factually substantiated because they are inherently subjective, such as the statement that a lawyer is "one of the best" or "one of the most experienced" in a field of law. Rule 4-7.2, cmt. Third, the rules prohibit ads that "promise[] results," Rule 4-7.2(c)(1)(G), which, again, would itself be unobjectionable except that the Bar applies it to statements that do not promise results at all, such as the phrase "Attorneys Righting Wrongs." Harrell Decl., Exh. 11 at 5. As to that slogan, the Bar apparently concluded that consumers would believe that the advertising attorney would *always* right any given wrong, even though such an interpretation would be absurd.

Other provisions of the rules prohibit as misleading any advertising technique that the Bar determines not to be "relevant" to the selection of counsel. To this end, Rule 4-7.1 prohibits use of "slogans or jingles," and Rules 4-7.2(c)(3) and 4-7.5 prohibit "visual and verbal descriptions" that are "manipulative, or likely to confuse the viewer." A comment to the rules explains that "manipulative" advertisements include advertisements that "create suspense, or contain exaggerations or appeals to the emotions, [or] call for legal services." Rule 4-7.2, cmt. As an example, the comment states that "a drawing of a fist, to suggest the lawyer's ability to achieve results" is prohibited. *Id.* In practice, the Bar has classified as manipulative images such as a man in handcuffs, elderly people looking out of a hospital or nursing home window, a house with severe damage to the roof and walls, the picture of a police car in a rear-view mirror, and a distressed mother with a child in a stroller. Harrell Decl., Exh. 6 at 5, Exh. 7 at 16, Exh. 11 at 4. Moreover, the rules prohibit television and radio advertisements that contain any background noises other than instrumental music. Rule 4-7.5(b)(1)(C). The Bar has applied this rule to prohibit, for example, the sounds of children playing, footsteps, and a flipped light switch.

Harrell Decl., Exh. 6 at 6.

II. Plaintiffs William H. Harrell, Jr. and Harrell & Harrell, P.A.

Plaintiff William H. Harrell, Jr. is an attorney in Jacksonville, Florida, and managing partner of the law firm Harrell & Harrell, P.A. *Id.* ¶ 1. Harrell is an experienced trial litigator, having practiced law in Florida since 1974 and earned an "AV" rating by Martindale-Hubbell. *Id.* ¶ 2. Harrell & Harrell employs sixteen attorneys licensed in Florida and is one of the largest personal-injury law firms representing plaintiffs in the state. *Id.* ¶ 3. The firm advertises its services to the public through broadcast media, print advertisements, billboards, and a website. *Id.* ¶ 4.

In 2002, Harrell submitted for review by the Florida Bar a transcript of a proposed television advertisement for the firm that included the statement "Don't settle for anything less." *Id.* ¶ 5. Staff counsel for the Bar responded by advising Harrell that the phrase did not comply with then-Rule 4-7.2(b)(1)(B) because it could "create unjustified expectations about results the lawyer can achieve." *Id.* ¶ 6. However, the Bar also stated that it was approving use of the phrase "Don't settle for less than you deserve" as an alternative to the proposed language. *Id.* Based on this assurance from the Bar, Harrell changed his advertisements to "Don't settle for less than you deserve" and, since then, has consistently used the revised phrase in television, radio, billboard, print, and Internet advertisements. *Id.* ¶ 7. Over the past five years, the phrase has acquired significant public recognition within the firm's market, so that consumers now readily identify it with Harrell & Harrell. *Id.* ¶ 16. Harrell has submitted, and the Bar has approved, multiple advertisements in different media since 2002 that prominently feature the phrase. *Id.* ¶ 7.

In 2006, Harrell began developing a new, updated advertising campaign for the firm. *Id.* ¶ 8. In an attempt to comply with the Bar's rules against use of scenes, props, background

noises, and other standard advertising techniques, Harrell discarded what he believed would be more interesting and effective campaign designs and instead selected a minimalist campaign featuring a black background, instrumental music, and pictures of lawyers from the firm. *Id.* Like Harrell's past campaigns, the new campaign featured the phrase "Don't settle for less than you deserve." *Id.* ¶ 9. Harrell believed that this campaign, although less effective than he would have preferred, was permissible under the rules because the Bar had already approved the phrase. *Id.*

Pursuant to the prior-restraint provision of Rule 4-7.7, however, Harrell was nevertheless required to submit his new advertisements for pre-approval by the Bar. *Id.* ¶ 10. Accordingly, on September 10, 2007, Harrell submitted the advertisements for review. *Id.* To Harrell's surprise, the Bar informed him that the ads did not comply with Rule 4-7.2(c)(2) because it had determined that the phrase "Don't settle for less than you deserve" improperly "characterizes the quality of the services being offered." *Id.* ¶ 11. Harrell responded by noting that the Bar had previously approved that exact phrase and that it had been in continuous use since 2002. *Id.* ¶ 12. Nevertheless, the Bar reaffirmed its decision that the phrase violated the rules and that running the advertisement could subject Harrell to discipline, ignoring Harrell's argument that the ads were protected by the First Amendment. *Id.* ¶ 13-14.

Because all the firm's advertisements since 2002 have featured the phrase "Don't settle for less than you deserve," Harrell & Harrell found itself confronted with an insoluble dilemma. Even if it reverted to its previously approved advertising campaign in an effort to comply with the Bar's decision, it would still run afoul of the Bar's new position that the phrase is prohibited. The firm had already invested a substantial amount of time and money in designing and implementing its new campaign, and it would have been expensive to design a new campaign from scratch to remove the prohibited phrase. *Id.* ¶ 15. Moreover, the phrase had developed a

significant amount of public recognition, and the firm could not stop using it without suffering a substantial loss of name recognition, goodwill, and, consequently, loss of client business. *Id.* ¶ 16.

Even if Harrell were to revise the ads to remove the prohibited phrase, he feared that the ads would nevertheless be rejected. *Id.* ¶ 20. Other stock advertising techniques in the ads, such as lighting effects, fades, slogans, and a faint whooshing sound as text moves across the screen appeared to implicate other aspects of the rules. *Id*. Nor could the firm pull its ads entirely without facing almost certain bankruptcy, since it depends on daily advertising to bring in new clients. *Id.* ¶ 17. Plaintiffs seek a preliminary injunction against enforcement of the rules against the Harrell & Harrell ads so that the firm can continue to run the ads without fear of discipline.

III. Plaintiff Public Citizen, Inc.

Plaintiff Public Citizen, Inc. is a national, nonprofit public interest organization. Public Citizen joined this suit to protect its members in Florida, who are injured when they are denied access to legal advertising that may be useful to them. For purposes of this motion, plaintiffs seek only to enjoin the Bar's enforcement of its rules against Harrell's advertising campaign, but Public Citizen reserves the right to seek permanent injunctive relief to prohibit enforcement of the challenged rules against other lawyers in the state.

ARGUMENT

To establish entitlement to a preliminary injunction, a plaintiff must show

> (1) a substantial likelihood of success on the merits of the underlying case; (2) that [plaintiff] will suffer irreparable harm unless an injunction issues; (3) that the harm [plaintiff] will suffer without an injunction outweighs the harm the injunction would cause the opposing party; and (4) that an injunction would not disserve the public interest.

Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1253 n.3 (11th Cir. 2005).

Plaintiffs satisfy these elements here. First, plaintiffs are likely to succeed in their claims because the challenged rules create a prior restraint on speech, are vague and arbitrarily administered, and do not provide for judicial review or other procedural safeguards required by the First Amendment. Moreover, the rules unconstitutionally restrict the content of protected commercial speech that is not false or misleading and that the state has no other legitimate interest in regulating. Indeed, the Eleventh Circuit has already held that the Bar's justification for the same rule applied to Harrell in this case—that statements about the quality of a lawyer's services will "mislead the unsophisticated public"—is a "non-sequitur" and is supported by nothing more than "unsupported conjecture." *Mason v. Fla. Bar*, 208 F.3d 952, 957-58 (11th Cir. 2000).

As to the other three elements of the preliminary injunction test, Harrell and other advertising attorneys suffer an irreparable injury as long as the state continues to enforce its unconstitutional restrictions on speech. Moreover, if Harrell were forced to remove the phrase "Don't settle for less than you deserve" he would lose the benefit of public name recognition of the phrase, which has accrued—in reliance on the Bar's previous assurance—over the past five years. On the other hand, the Bar has no valid interest in prohibiting Harrell from using a phrase that it allowed him to use since 2002 without complaint or evidence of deception, or in enforcing arbitrary rules that serve no consumer-protection function.

I. The Challenged Rules Are an Unconstitutional Prior Restraint on Commercial Speeech.

A prior restraint is a system of administrative review that gives "public officials the power to deny use of a forum in advance of actual expression." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Prior restraints are the "least tolerable infringement on First Amendment rights," and there is a heavy presumption against their validity. *Nebraska Press*

Ass'n v. Stuart, 427 U.S. 539, 563 (1976). Because prior restraints put speech at the mercy of state decisionmakers, they have a great capacity to chill speech. *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988). For example, lawyers are unlikely to invest in the expensive process of writing and producing an advertisement if there is a risk that it will be disapproved by the Bar, and they have a strong incentive to include only the most innocuous content to avoid the possibility of censorship. Moreover, prior restraints make it easy for state officials to discriminate surreptitiously on prohibited grounds, such as, for example, a state official classifying an advertisement as "misleading" because the official personally finds it distasteful. *See id.*

To protect against these problems, a system of prior restraint must both (1) limit the discretion of decisionmakers, and (2) provide stringent procedural safeguards, including immediate judicial review. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361 (11th Cir. 1999). The prior-restraint system in this case fails both requirements.[2]

A. Discretion

The Supreme Court has "[i]nvariably . . . felt obliged to condemn systems in which the exercise of [prior restraint] authority was not bounded by precise and clear standards." *Southeastern Promotions*, 420 U.S. at 553. "An ordinance that gives public officials the power to decide whether to permit expressive activity must contain precise and objective criteria on which they must make their decisions; an ordinance that gives too much discretion to public officials is

[2] Although the Supreme Court in *Central Hudson* left open the question whether prior restraint applies to commercial speech, the circuits that have examined the question have held that it does. *See, e.g.*, *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 131 (2d Cir. 1998); *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 818 (1996); *Kitty's East v. United States*, 905 F.2d 1367, 1371-72 (1990); *Bosley v. Wildwett.com*, 2004 WL 2169179, at *1 (6th Cir. 2004). Moreover, the Supreme Court and Eleventh Circuit apply prior-restraint analysis to other areas of "non-core" speech, such as nude dancing. *See, e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Lady J. Lingerie*, 176 F.3d 1358.

invalid." *Lady J. Lingerie*, 176 F.3d at 1361. The level of specificity that must govern decisionmakers in a system of prior restraint is very high—the Eleventh Circuit has held that "virtually any amount of discretion beyond the merely ministerial is suspect." *Id.* at 1362.

The standards governing the decisionmakers in this case are far from precise or ministerial. The rules require staff attorneys, with no expertise in advertising techniques and without the benefit of any evidence, to decide whether an advertisement is "useful" or "sensational," whether it provides "objective information" that can be "objectively verified" or is inherently subjective and unverifiable, whether it is "manipulative" or "likely to confuse the viewer," and whether it "create[s] suspense," "contain[s] exaggerations," "calls for legal services," or "appeal[s] to the emotions," and whether it satisfies the Bar's shifting criteria for application of other rules. These standards are so broad and so subjective that it is impossible to expect the Bar to enforce them consistently or fairly.[3]

The problem is illustrated in the Bar's treatment of Harrell's ad. The Bar initially rejected "Don't settle for anything less," but approved "Don't settle for less than you deserve," though it is not obvious why one is likely to mislead consumers and the other is not. Harrell Decl. ¶ 7. Then, five years later, the Bar changed course and decided that the revised phrase was also prohibited. *Id.* ¶ 14. The Bar's inability to consistently apply its own rules demonstrates their impossibly subjective nature. *See Konikov v. Orange County*, 410 F.3d 1317, 1330-31 (11th Cir. 2005) (finding an inherent risk of discriminatory enforcement and striking down a prior restraint where two enforcement officials differed in their opinion of what would trigger a violation).

[3] The Florida Supreme Court at one point seemed to agree. The 1990 amendments to the rules, which adopted many of the challenged restrictions, deleted from the comment to Rule 4-7.1 the statement that "[q]uestions of effectiveness and taste in advertising are matters of speculation and subjective judgment" and that "[l]imiting the information that may be advertised . . . assumes that the bar can accurately forecast the kind of information that the public would regard as relevant." *Petition to Amend the Rules Regulating the Florida Bar*, 571 So.2d 451, 463 (Fla. 1990).

The Bar's treatment of Harrell is just one example of a system marked by pervasive arbitrariness and unfair results. To describe just a few of many recent cases:

- The Bar found that the phrase "As your legal advocate, I will work hard to make sure you can get the medical treatment and compensation you legally deserve" improperly characterized quality of services. Harrell Decl., Exh. 5 at 3. However, the Bar concluded that the phrase "We work hard to get benefits for people who need them most" was allowed. *Id.*, Exh. 6 at 2. And, in a 3-2 vote, the Board of Governors determined that the phrase ". . . for more than 10 years I've stood side by side with fellow boaters, working to get compensation for their injuries" was also permissible. *Id.* at 1.

- The Bar's advertising handbook provides the image of a smiling family as an example of an acceptable ad, *id.*, Exh. 2 at 57, but the Bar voted to impose discipline on an attorney for running an advertisement with the image of a "distressed mother with child in stroller" because the image was "manipulative." *Id.*, Exh. 7 at 16.

- The Bar held that the trade name "Ticket Wizards" improperly characterized the quality of services and was misleading, but also held that an *image* of a wizard in the same ad was permissible. *Id.*, Exh. 11 at 4.

- The Bar disciplined an attorney for advertising with the phrase "you need someone who you can turn to, for trust and compassion with this delicate matter," concluding that the advertisement improperly characterized the quality of legal services. *Id.*, Exh. 6 at 3. The Bar's advertising handbook, however, provides that an essentially indistinguishable phrase would not violate the rules: "Caring Representation in Family Law Matters. I Want to Help You Through this Difficult Time." *Id.*, Exh. 2 at 56. Moreover, the Bar apparently has not taken action against a law firm currently advertising in the Jacksonville area with the phrase "Helping Florida's Injured," and another firm with the slogan "we know and we can help." *Id.* ¶ 24.

- The Florida Supreme Court held that the image of a pit bull was "sensational," characterized the quality of a lawyer's services, and was "deceptive, misleading, or manipulative." *Pape*, 918 So. 2d 240. The Court also noted that images of sharks, wolves, crocodiles, and piranhas would be prohibited by the rules because of the aggressive nature of these animals. *Id.* at 247. On the other hand, the Bar later determined that images of panthers are permissible. Harrell Decl., Exh. 8 at 3-4. And a firm advertising on television in Jacksonville uses the phrase "get aggressive attorneys," apparently without interference from the Bar. *Id.* ¶ 23.

- The Bar determined that the phrase "Attorneys Righting Wrongs" promises results, but, in a split vote, determined that "we stand up to the insurance companies to protect your rights" does not. *Id.*, Exh. 10 at 10, Exh. 11 at 5.

- A comment to the rules provides that the image that the Supreme Court held constitutionally protected in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626

(1985), which depicted an intra-uterine device as a means of indicating that the attorney was willing to take the cases of women injured by that device, would be allowable under the rules because the image was "informational and not misleading." Rule 4-7.2, cmt. However, the Bar held that the image of a police car as seen through a rear-view mirror was misleading and manipulative in the context of an advertisement for representation in ticket cases. Harrell Decl., Exh. 11 at 4. Similarly, the Bar held that images of a damaged house, a car accident, an elderly man in a hospital bed, and a man in handcuffs, to represent other attorneys' areas of practice, were misleading, but it did not explain how these images were less "informational" than the image at issue in *Zauderer*. *Id.*, Exh. 6 at 5, Exh. 7 at 16, Exh. 11 at 4.

* * *

Because the Bar does not provide written explanations of its decisions, attorneys in Florida are left to guess at how the Bar reaches these disparate results. The rules, vague on their face and arbitrarily applied, are far from the "ministerial" rules with "precise and objective" standards that are minimum requirements of any lawful system of prior restraint.

B. Judicial Review

Even in exceptional cases where the Constitution permits prior restraints on expression, the Supreme Court has "tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (citations omitted). As a constitutional minimum, a system of prior restraint must provide "expeditious judicial review" of the decision to restrain, and "the censor must bear the burden of going to court to suppress the speech and . . . the burden of proof once in court." *FW/PBS*, 493 U.S. at 227.

The procedures provided by the Bar do not satisfy these standards. Although the rules arguably provide for appeal of a staff attorneys' decision to the Standing Committee on Advertising and then to the Bar's Board of Governors, they provide for no judicial review. Florida Bar Procedures for Issuing Advisory Opinions Relating to Lawyer Advertising or Solicitation, May 24, 2002 (Harrell Decl., Exh. 4). Moreover, the Bar does not provide a written

explanation for its decisions or respond to arguments that its decisions are unconstitutional. Under the Bar's system of prior restraint, the state can restrict speech without initiating or proving its case in court, putting the burden on the restricted speaker to initiate an action such as the one Harrell initiated here. Moreover, as explained in the following section, the state ordinarily has the burden of proving that its restrictions on speech are necessary and effective. The most troubling aspect of the rules is that they allow the state to bypass that burden by imposing restrictions on speech without the need to prove or even articulate an interest in doing so, and without showing that the restrictions are either necessary or effective. The serious chill resulting from such a system renders it invalid under the First Amendment.

II. The Challenged Rules Unconstitutionally Restrict the Content of Commercial Speech.

In *Mason*, the Eleventh Circuit examined the same provision that the Bar invoked against Harrell here and held that it violated the First Amendment as applied to the lawyer in that case. 208 F.3d 952. The Bar had prohibited an attorney from stating that he had received "the highest rating" from Martindale-Hubbell on the ground that the statement violated then-Rule 4-7.2(j)'s prohibition on "statements that are merely self-laudatory or statements describing or characterizing the quality of the lawyer's services." *Id.* at 954. The Eleventh Circuit, however, rejected the Bar's contention that Mason's advertisement would "mislead the unsophisticated public," noting that the Bar had "presented no studies, nor empirical evidence of any sort" to back up its alleged concern. *Id.* at 957. Although the Bar has now abolished the ban on "self-laudatory" communications, the broader portion of the rule, which prohibits "statements describing or characterizing the quality of the lawyer's services," remains intact, and it is this rule that the Bar applied to prohibit Harrell's ad. Rule 4-7.2(c)(2). And although the Bar engaged in an extensive review of its advertising rules in 2004, it has still failed to justify its restriction

with actual evidence. *See* Final Report of the Advertising Task Force 2004, Dissent of Task Force Member Bill Wagner, at 2 (Harrel Decl., Exh. 3) ("[T]he Task Force made no effort to obtain empirical evidence either to support retention of our present system of the regulation of advertising or to support acceptance or rejection of any proposed changes. Instead the Task Force relied almost exclusively upon the unsupported opinions of the individual Task Force members.").

As *Mason* explained, a state that wishes to prohibit commercial speech, including lawyer advertisements, must carry the burden set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Under *Central Hudson*, the court must first determine whether the regulated speech is misleading or involves unlawful activity and therefore falls outside the potential protections of the First Amendment. *Id.* at 563-64. If the speech falls within the First Amendment's ambit, the government must factually demonstrate the existence of three factors before it may impose restrictions: "(1) whether the state's interests in limiting the speech are substantial; (2) whether the challenged regulation advances these interests in a direct and material way; and (3) whether the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Mason*, 208 F.3d at 955-56. This burden is a heavy one that is "not satisfied by mere speculation or conjecture; rather, a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

A. The Regulated Speech Is Not False or Misleading.

The types of advertisements prohibited by the rules, such as the statement "Don't settle for less than you deserve," are not factually false—they are nothing more than stock advertising

devices frequently used by lawyers and others in effective advertising. Techniques that consumers are used to seeing on television every day—such as slogans, scenes, sound effects, and even comic relief—are all prohibited by the rules' plain language. The Bar's regulation of these common techniques is based on the premise that "certain types of advertising by lawyers create the risk of practices that are misleading or overreaching and can create unwarranted expectations by persons untrained in the law." Rule 4-7.1, cmt. A state may not, however, completely prohibit a category of speech "if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203 (1982); *see Zauderer*, 471 U.S. at 648-49 (rejecting the state's assertion that illustrations in lawyer ads create "unacceptable risks that the public will be misled, manipulated, or confused"). To the contrary, the Supreme Court has repeatedly held that "rote invocation of the words 'potentially misleading' does not relieve the state's burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez v. Fla. Dep't of Bus. and Prof'l Reg.*, 512 U.S. 136, 146 (1994) (internal quotations omitted).

In *Zauderer*, the state enacted broad prophylactic rules against the use of illustrations in advertisements on a rationale nearly identical to that relied on by the Bar in support of the challenged rules here—that illustrations have the potential to mislead the uninformed public. 471 U.S. at 648. The Supreme Court rejected the state's contention that it could ban a whole category of speech because the prohibited techniques could sometimes be abused in individual cases, holding that the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Id.* at 646. Thus, even if there is a "risk" that the devices prohibited by the Florida Bar could be misused—and there is no reason to believe the

risk as to these techniques is any worse than the risk as to any other kind of advertisement—there are many situations where attorneys could use the prohibited techniques in a non-misleading manner. As Chief Justice Shaw wrote in dissent to the Florida Supreme Court's adoption of the prototype to the current advertising rules in 1990: "Although the banned advertising practices may have been the subject of abuse and are potentially misleading, they are not inherently so. Each can be, and undoubtedly has been, used effectively to provide the consumer with clear and truthful information concerning the availability of important legal services." *Petition to Amend the Rules Regulating the Florida Bar*, 571 So.2d at 474.

As in *Mason*, the Bar has no evidence to justify its belief that common advertising techniques and statements like "Don't settle for less than you deserve" are likely to "mislead the uninformed public." *Mason*, 208 F.3d at 958 (holding that the Bar's concerns were "mere speculation" and "unsupported conjecture"). Harrell's ads have already been running for five years with the now-prohibited phrase with no evidence of public confusion. Indeed, when the Bar invoked its rule against characterizing the quality of a lawyer's services to prohibit Harrell's ads, it made no allegation that the ads were misleading. It defies belief that consumers could be misled by such an innocuous advertising device.

B. The State Has No Valid Interest in the Challenged Regulations.

Although Florida's advertising rules are couched in the words "false" and "misleading," the state has made little effort to conceal its true motivation for banning these harmless advertising techniques. As a comment to the rules explains, their purpose is to prevent "the creation of incorrect public perceptions or assumptions about the manner in which our legal system works, and to promote the public's confidence in the legal profession and this country's system of justice." Rule 4-7.5, cmt.; *see also Pape*, 918 So. 2d at 246-47 ("Prohibiting

advertisements such as the one in this case is one step we can take to maintain the dignity of lawyers, as well as the integrity of, and public confidence in, the legal system."). In other words, the Bar's purpose in prohibiting the techniques is to prohibit advertisements that it thinks makes lawyers, and by implication the system of justice, look bad. Justice Barkett summed up this purpose in her dissent to the Florida Supreme Court's order adopting the original version of the rules, stating that the regulations "only regulate decorum." *Petition to Amend the Rules Regulating the Florida Bar*, 571 So.2d at 475.

A state cannot restrict lawyer advertising, however, merely because it finds it undignified or in poor taste. *Zauderer*, 471 U.S. at 647-48. The Supreme Court has consistently held that attorneys have a First Amendment right to advertise even if the advertisements are "embarrassing or offensive" to some members of the public or "beneath [the] dignity" of some members of the Bar. *Id.* Though a state may consider information conveyed by an advertisement to be "of slight worth," it is for "the speaker and the audience, not the government, [to] assess the value of the information presented." *Edenfield*, 507 U.S. at 767. In this case, the state's attempt to prevent the development of "incorrect public conceptions" is no more than an effort to manipulate public opinion by suppressing speech. No justification for speech restrictions is more offensive to the First Amendment. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

Even if the state did have a valid interest in protecting the dignity of lawyers, it has no evidence that lawyer advertising in general, and the targeted forms of advertising in particular, have a negative impact on the image of the Bar. As the Supreme Court wrote in *Bates v. State Bar of Arizona*, other professions such as bankers and engineers advertise (often using methods

similar to those used by lawyers), "and yet these professions are not regarded as undignified." 433 U.S. 350, 369-70 (1977). Almost all advertisements in other industries use at least one of the techniques prohibited by the Bar, and many of them are done tastefully in a way that appeals to consumers. Improving public opinion of a product or service is, after all, one of the main motivations for advertising. Harrell's ads, for example, are restrained when compared to many other ads that routinely run on television. Harrell Decl. ¶ 9. Indeed, as the Court noted in *Bates*, the failure of lawyers to advertise may create public disillusionment with the profession, because "[t]he absence of advertising may be seen to reflect the profession's failure to reach out and serve the community." 433 U.S. at 370-71.

C. The Rules Do Not Advance the State's Purported Interests.

Even assuming that the state has some valid interest in prohibiting the targeted forms of speech, it still must "bear[] the burden of showing not merely that its regulation will advance its interest, but also that it will do so to a material degree." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996). In this case, the state has asserted an interest in protecting consumers by prohibiting various advertising techniques that it considers to be irrelevant to the selection of counsel or inherently unverifiable. It would be inconceivable for the state to extend such rules to other industries—to prohibit, for example, Coca-Cola from using a slogan because state authorities believe it is "irrelevant" to a customer's selection of soda or consider it to be "manipulative." Yet, the Supreme Court has stressed that a state's distaste for lawyer advertisements does not allow it to restrict truthful, nonmisleading advertising to any greater extent than it can restrict similar advertising in other industries. *See Zauderer*, 471 U.S. at 646-47; *see also Alexander v. Cahill*, 2007 WL 2120024, at *4 n.1 (N.D.N.Y. 2007) (holding that the fact that attorney advertising is "irrelevant, unverifiable, and non-informational" does not

"constitute a justification for banning commercial speech").

1. The Prohibitions on "Irrelevant" Advertising

The Supreme Court has already refused to credit state efforts to protect consumers by banning advertising techniques that the state considers irrelevant to the selection of counsel. In *Bates*, the state bar argued that attorney advertising could be prohibited because of its potential to "highlight irrelevant factors" in the selection of a lawyer. 433 U.S. at 372. The Court refused to accept the state's asserted interest, noting that it "assumes the public is not sophisticated enough to realize the limits of advertising." *Id.* at 374-75; *see also id.* at 376 (holding that the state could not limit advertising to a "laundry list" of generic information because "an advertising diet limited to such spartan fare would provide scant nourishment"). Similarly, the Court in *Shapero v. Kentucky Bar Association* rejected the state's effort to ban an attorney solicitation designed to "catch the recipient's attention." 486 U.S. 46 (1988). The state argued in *Shapero* that the solicitation "stat[ed] no affirmative or objective fact," constituted "pure salesman puffery," and was an "enticement for the unsophisticated, which committed [the lawyer] to nothing." *Id.* at 478 (internal quotation marks omitted). The Court, however, held that the state could not "limit lawyer advertising to "a bland statement of purely objective facts," holding that "so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those [forms] least likely to [gain the attention of] the recipient." *Id.*; *see also In re RMJ*, 455 U.S. 191, 205-06 (1982) (holding that an attorney advertisement was "relatively uninformative" and in "bad taste," but nevertheless constitutionally protected in the absence of evidence that "such a statement could be misleading to the general public"); *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998) (holding that an image of a frog with its middle finger extended, although

"lack[ing] precise informational content," was nevertheless entitled to First Amendment protection).[4]

Even if the state had an interest in prohibiting "irrelevant" ads, "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976). Advertising techniques that the state may consider to be frivolous may nevertheless serve "important communicative functions," including "attract[ing] the attention of the audience to the advertiser's message" and, often, "impart[ing] information directly." *Zauderer*, 471 U.S. at 647. Lawyer advertisements must compete in a marketplace of ideas where rival messages for other goods and services will inevitably use the sort of techniques prohibited by the rules, and lawyers will have a difficult time getting their message heard when they have to compete with other commercial advertising that is not similarly restricted. Thus, although the state may consider certain information to be "of slight worth," it is for "the speaker and the audience, not the government, [to] assess the value of the information presented." *Edenfield*, 507 U.S. at 767. As the Supreme Court has recognized, "[m]ost businesses . . . are unlikely to underwrite promotional advertising that is of no interest or use to consumers." *Central Hudson*, 447 U.S. at 567 (holding that ads were protected by the First Amendment even if they "convey[] little useful information").

2. The Prohibitions on "Unverifiable" Advertising

In addition to advertising it considers to be "irrelevant" to the selection of counsel, the

[4] The Florida Supreme Court's decision in *Florida Bar v. Pape*, 918 So. 2d 240, flies in the face of these precedents. Without the benefit of any evidence and without applying the *Central Hudson* test, the Court in *Pape* upheld a restriction on the depiction of a pit bull in an attorney's ad, holding that the advertisement fell outside the protection of the First Amendment because it was not "accurate and objectively verifiable factual information." *Id.* at 247. The case has been criticized as a paternalistic and subjective decision that is inconsistent with U.S. Supreme Court precedent. Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 Ark. L. Rev. 437 (2006). *Pape* was wrongly decided and should not be applied here.

Bar bans communications that it considers inherently subjective or unverifiable. *See supra*, at 4-5. The Bar's prohibition of these techniques is based on the assumption that statements that the public cannot easily verify are inherently misleading to the unsophisticated public, an assumption that the Eleventh Circuit in *Mason* called a "non sequitur." 208 F.3d at 957. No consumer, for example, is likely to take the phrase "Don't settle for less than you deserve" as conveying some sort of objective truth about a lawyer's skills. The Supreme Court has also recognized that consumers are not so easily misled, rejecting a state's effort to ban advertisements that it argued were "potentially misleading" to consumers. *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91, 100 (1990) (plurality opinion). The Court refused to credit "the paternalistic assumption" that consumers of legal services "are no more discriminating than the audience for children's television." *Id.* at 105.

Many other courts have also recognized that advertising is not misleading to consumers just because it contains "exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying" or "a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion." *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 496 (5th Cir. 2000) (holding that that Pizza Hut's slogan "Better Ingredients. Better Pizza" was not actionable as false advertising); *American Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387 (8th Cir. 2004) (holding that the motto "America's Favorite Pasta" was unverifiable but neither false nor misleading). Indeed, courts view a statement's inherent unverifiability as a factor *enhancing* protection under the First Amendment, because "a reader cannot rationally view an unverifiable statement as conveying actual facts." *Mr. Chow of N.Y. v. Ste. Jour Azur S.A.*, 759 F.2d 219, 229 (2d Cir. 1985) (internal quotation omitted). If statements of quality and routine puffery were

considered inherently misleading, "the advertising industry would have to be liquidated in short order." *Pizza Hut*, 227 F.3d at 499 (internal quotation marks omitted).

D. The Rules Are Not Narrowly Drawn.

"If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U. S. 357, 373 (2002). The state here, however, appears to have adopted its chosen regulations as a *first* resort, without even considering readily available alternatives.

1. The Rules Are Vastly Overbroad.

To survive the final prong of the *Central Hudson* test, a restriction on allegedly deceptive speech must not be "broader than reasonably necessary to prevent the [targeted] deception." *RMJ*, 455 U.S. at 203. The rules, however, sweep in many forms of advertising that are not likely to harm any consumer, or, for that matter, even to be distasteful to them. Given that the purpose of advertising is to grab the consumers' attention and characterize the advertiser's services, the rules prohibit essentially all the most common methods of advertising and would effectively limit advertisements to information that might appear in an attorney's resume. An advertisement that followed all the Bar's content-based restrictions would be so sterile that no lawyer would want to run it. As Chief Justice Shaw noted in his dissent to the original adoption of the rules: "[I]t appears to me that the majority, out of frustration and annoyance, is swatting at a troublesome and persistent Bar fly with a sledgehammer." *Petition to Amend the Rules Regulating the Florida Bar*, 571 So.2d at 474.

2. The State Has Ignored Readily Available Alternatives to Address Its Alleged Interests.

"[I]f the government [can] achieve its interests in a manner that does not restrict speech or that restricts speech less, it must do so." *Thompson*, 535 U. S. at 371. In this case, defendants

cannot show that other regulations short of a complete ban would fail to accomplish the state's goals. For example, if the state could show that certain forms of speech are likely to mislead consumers, it could impose disclosure or disclaimer requirements to prevent the risk of consumer confusion instead of prohibiting the speech entirely. *See RMJ*, 455 U.S. at 203 ("[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may be presented in a way that is not deceptive."); *This That and Other Gift and Tobacco, Inc. v. Cobb County*, 285 F.3d 1319 (11th Cir. 2002) (striking down a restriction on advertising for sexual devices where the ban was more extensive than necessary, and a disclaimer would have been feasible). That disclaimers for many advertisements prohibited by the rules would be absurd—for example, a disclaimer that an "illustration of a fist does not necessarily mean that you will prevail in your case," "the sound of a light switch should not influence your choice of an attorney," or "'what you deserve' is subjective and may differ from person to person"—simply underscores that there is nothing misleading about such advertising techniques, and that the rules, as applied in these situations, do not protect consumers.

As another alternative to its rules restraining speech, the Bar could achieve its purposes by conducting its own outreach efforts to educate consumers about the factors on which they should rely in selecting an attorney. A basic tenet of our First Amendment is that allegedly distasteful speech is best dealt with in the marketplace of ideas, through *more* speech aimed at providing a better or more balanced point of view. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). As the Supreme Court wrote in *Bates*, "[i]f the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." *Bates*, 433 U.S. at 375.

III. The Other Preliminary Injunction Factors Also Favor Plaintiffs.

In a case involving direct restrictions on First Amendment rights, the remaining three factors of the preliminary injunction test are almost always satisfied, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," and because neither the state or the public's interest in enforcement of an unconstitutional regulation can outweigh the impact on fundamental rights. *KH Outdoor, LLC v. City of Trussville,* 458 F.3d 1261, 1272 (11th Cir. 2006) (internal quotation omitted).

In this case, the preliminary injunction factors particularly favor the plaintiffs. If forced to stop using its current advertisements, Harrell's firm risks losing public name recognition in the phrase "Don't settle for less than you deserve," which it has accrued—in reliance on the Bar's previous assurance—over the past five years. Moreover, even if Harrell were to re-make his ads, the breadth and vagueness of the rules would make it impossible for him to predict whether the revised ads would pass Bar scrutiny. In contrast, given that the Bar allowed Harrell to run his ads between 2002 and 2007 without complaint or evidence of consumer confusion, neither the state nor the public will be harmed by maintaining the status quo for the additional time that it takes this Court to reach a final decision on the merits. Nor does the state have an interest in continued enforcement of rules that serve no consumer-protection function or other legitimate interest.

CONCLUSION

The challenged rules are an unconstitutional restriction of commercial speech. This Court should issue the requested preliminary injunction to prohibit enforcement of the challenged rules against Harrell's advertising campaign until the case can be finally decided on the merits.

Respectfully submitted,

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Dated: January 17, 2007.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Barry Richard, Greenberg Traurig, LLP, 101 East College Avenue, Tallahassee, FL 32301, (counsel for all defendants), by mail this 17th day of January, 2008.

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